

**Milton Town Council Meeting
Milton Theatre, 110 Union Street
Thursday, September 20, 2007
7:00 PM**

Mayor Post called the meeting to order at 7:00 PM. He called roll for attendance

C Brown	Present
C Duby	Present
C Hudson	Present
C Prettyman	Present
C Abraham	Absent
C Betts	Absent
Mayor Post	Present

PUBLIC PARTICIPATION

Lynn Ecklin, 406 Union – last meeting we were told by the Town Manager that he was going to submit the building plans to the Fire Marshall in 15 days, which would have been yesterday. Has he done so?

Mayor Post: They have been in contact with the Fire Marshall and we are handling it. There would have to be total no changes because the complaint doesn't match anywhere near what the plans were drawn for. It's been taken way down to what the requirements are going to be. It's going to be very minor. There is the possibility of a staircase off the back. As for the interior work, we're just talking about some lit exit signs, some fire extinguishers, very minimal.

Lynn Ecklin – are we still in violation.

Mayor Post: Probably not because Dover is handling it now. It's out of the County's hands.

Lynn Ecklin – that \$100M that we allocated for renovations for the Town Hall the changes that you're talking about certainly don't equal \$100M. What are we going to do with the balance?

Mayor Post: It would probably go back into the general fund.

Jim Welu, 30231 E. Mill Run, Milton – I'm here to speak to the Dr. Howard property again. I spent some time at Town Hall and reviewed the 200 letters of recommendation. I don't know if the members of the Council have looked at them, but there are two letters in there basically. One written by Dr. Howard, I presume to his patients, and a few people sent that back with comments and then a form letter that was probably sent with that which a number of people signed, a few had comments, very few had addresses on them. I recognized a number of the names from Overbrook Shores. I know if someone tried to this in Overbrook Shores they would be shut down immediately. I noticed some

of them were from Wagamon's West. They've had a big dispute about putting a swing set in somebody's yard so I don't think that would fly very well out there. I talked with one individual whose mother signed this form letter and she had no idea what Dr. Howard was really proposing. She didn't know there was going to be this big addition to the property. I would suggest that you take those letters with a certain grain of salt in terms of being the recommendations of the Town of Milton.

I'd like to raise another issue. I didn't realize that if you didn't like the votes you got at P&Z you could start all over at P&Z. I've been told you can only go back to P&Z if there's some major substantial change in your site plan or your proposal. While I was at Town Hall I looked at the design for what they would be adding. Their design is awful. My major thing is are they really able to go back to P&Z and try and get a favorable response from P&Z at this point.

John Brady: Going back to P&Z, based on a due process consideration under procedural due process, we came for a vote. It was voted on by members of Council at that time. They reviewed the record in front of them from P&Z and they heard testimony that was presented at the public hearing. At the next meeting an issue was raised about notice. I took that and reviewed it and found that the notice that was supposed to have been posted in front on the Town bulletin board was not posted. It was not their fault it was not posted, it was a mistake of the Town. Therefore, it was noticed again for a revote of Council. At that point, there were two new Council members. The issue came up whether or not the two new Council members could participate. Based on Delaware Law, when there is a revote, newly constituted Council members, have the power to vote on something that's brought back in front of them, but if there was a hearing they would have had to listen to all the tapes and to read the record. When a concern was raised that there may be some information they wanted to put in the record and they didn't, if you wish to return it to P&Z which is set for Oct 16 at 7PM here in the Milton Theatre, then the record would reopen, it would go back to P&Z, put everything on the record there, P&Z can make a recommendation then it would be on the Nov 5 meeting of Town Council. And that was the process they chose to do. It is not extraordinary. It complies with both procedural due process and substitute due process. A mistake was made in the posting. You can't hold that mistake against the applicant.

Jim Welu: But that doesn't allow them to change the records back to P&Z.

John Brady: They can add things to the record and make their presentation and P&Z gets to vote on it again as well. And if P&Z votes not to recommend then it will require a four fifths vote of the Town Council to overturn that recommendation. The record will be open; the meeting notice will go up very shortly for P&Z on that date. Everyone is encouraged to participate. All the letters can be filed and public testimony will be taken.

Cliff Newland, Wagamon's West Shores I want to speak on recycling. I'm very much for recycling and recycle myself. I'm totally against having to pay for recycling. The last two states I lived in we had mandatory recycling and neither state taxed us at all. The states make money on this recycling. Rehoboth Beach just approved mandatory

recycling and they're not charging the homeowners. DSWA says that 30% of your waste is recyclable. Therefore, the land fees for dumping the regular waste should go down and they should be able to sell the material that we recycle.

C Hudson: With regard to complaint to the Fire Marshall about the Town Hall, does our insurance cover staff and the public while we're working on the complaint.

John Brady: We're covered, yes. The third floor will not be used for offices or meetings.

Jim Welu: I don't know who bid on our trash contract, but Independent Disposal Services has done an excellent job in the Town.

CALL TO ORDER AT 7:15 PM

Mayor Post called the Milton Town Council Meeting, Thursday, September 20, 2007

MOMENT OF SILENCE

Mayor Post called for a moment of silence.

PLEDGE OF ALLEGIANCE TO THE FLAG

All in attendance said the Pledge of Allegiance

ROLL CALL – MAYOR POST

C Brown	Present
C Duby	Present
C Hudson	Present
C Prettyman	Here
Mayor Post	Here

C Betts	Absent
C Abraham	Absent

ADDITIONS OR CORRECTIONS TO THE AGENDA

C Prettyman: I would like to make a motion to take the Executive Session off the agenda.

C Hudson: Second

Mayor Post: We have a motion and second, all in favor say aye, motion carried

APPROVAL OF AGENDA

C Prettyman: I move to approve the agenda

C Hudson: Second

Mayor Post: We have a motion and a second, all in favor say aye, motion carried

NEW BUSINESS

Award of Trash Removal Contract – Cabe Assoc.

Scott Hoffman, Cabe Associates: I was the Project Manager for the bidding process for the trash collection contract. We were asked to prepare an RFQ for the waste collection contract on 7/20, we submitted to the Town on 7/31, advertised RFQ on 8/6, and opened bids on 8/30. We had four bidders at the time of opening. We included 6 options in the bid. There were two major options; either a 3 year contract or a 5 year contract. And within each of those two time periods we requested prices for no recycling, to include weekly recycling and to include bi-weekly recycling. The lowest bidder was MT Trash Inc. of Bridgeville, DE for all the options presented. The results of the bid package by page were discussed. Mike Stang from MT Trash is here tonight if there are any questions. Service is to start October 1, 2007. Just a note on recycling; if you pick an option that does not have recycling anybody in Town can still get recycling thru DSWA. It's going to be \$6 per month. One additional item; there is provision in the contract for increases in tipping fees so that the contract can be renegotiated if tipping fees are increased. There are certain things that can be dialed into the bid. Tipping fees is not one of them. For those of you who don't know, tipping fees is when the trash truck arrives at the landfill, they weigh it, it weighs X-tons, they dump the trash, they drive out, and they weigh the difference. The cost in \$ & tons is what they pay. MT Trash also serves the Town of Bridgeville and they have approx 3,000 private residential customers.

John Brady: Members of Council you have the breakdown of the bids in front of you. When the Town referred to me in July saying the trash contract was about to expire, review of Delaware Law required that this be placed out to public bid. You had four bidders respond. As Council members you have to make a decision to lowest responsible bidder. A responsible bidder is one that can perform in a timely manner the duties of the contract. The duties of the contract require that the trash be picked up in an appropriate container starting each Monday for the contract period. An issue did come up in the last two weeks since the bids came in that tabulation process was not complete and all the things had not been reviewed by the time of your last Council meeting that's why it was not on the agenda for the September meeting. The additional information came in and the items were forwarded to Town Hall, a special agenda was posted for this meeting tonight. The information in front of you is that being everything we weighed equal you have to make the determination is the lowest bidder a responsible bidder. The issue that did come up as Scott discussed was involving the totters, which a technical term for the 96 gallon trash can that's provided to each household. A responsible bidder has to be able to have those in place at the start of the contract or immediately thereafter. The questions came up about whether or not this could be awarded by just a phone call vote of members of Town Council. The Attorney General's office interpreting the FOIA says a special meeting is required and a phone call poll would be insufficient to have a bid awarded. That's why you have a special meeting tonight to award the bid. IDS is the current provider of the services, the totters are in place, so there would be no switchover

needed if they were re-awarded the contract; however, they were not the lowest bidder. A question was posted to MT Trash, the lowest bidder, can you have the totters available for the contract period. The letter you have responded back is that they would be based on written order on Friday, estimated delivery is Friday, Sept. 28 and distribution starting October 1. At this point members of Council can ask Mr. Hoffman any questions since Cabe Associates did the handling of the contract in the bidding. All of the advertising was done in accordance with State Law. The bid process was open in accordance with State Law and all the formalities of State Law were followed.

Mayor Post: I think there was a phone conversation; I don't know where it came from, that you had requested that the Town distribute the trash receptacles to all the homes. I don't think we're in agreement to that it would be your responsibility to place those at each of the homes.

Scott Hoffman – Before Mike answers could I make a clarification as to where that information came from. After the last Council Meeting the Town Manager requested that I begin the process of getting the transition going. At that time I contacted the low bidder, which was MT Trash, and we discussed an idea for how that transition would be made and I forwarded that information to Mr. Dickerson.

Mayor Post: Is there going to be a mechanism that on October 1 the trash can be picked up, but you will also be able to provide a new receptacle during that time to every home that's currently being served in the Town of Milton.

Scott Hoffman – That becomes a very difficult question because the trash that will be out for the week of Sept 28 will be someone else's receptacle. It's not in the industries habit to touch anybody else's equipment.

Bruce George, IDS – If our last pickup is Monday September 24 we have met our obligations to the Town we could get our containers that afternoon. I will not leave the Town high and dry. This is a very small State. When I leave here I'm going to leave with my head up high.

C Duby: I haven't seen the request for proposal so I don't know what the requirements were, but the question I would have for MT is, will all of the requirements of citizens be exactly the same.

Mike Stang – there will be no difference in requirements.

Scott Hoffman – in developing the RFQ we constructed that around the Towns existing service, because it was eluded to that they like the way the service is now.

C Duby: I asked the question because a couple of people contacted me to say they didn't know what was going, whether the requirements would be the same.

C Brown: To both MT and IDS, what are the arrangements for not mainstreaming recycled waste?

Scott Hoffman – the recyclable material will be collected by DSWA. Not by these gentlemen. MT will pay DSWA for that service. DSWA will deliver the recyclable containers.

C Hudson: Why can't we sell our recyclable material and make money off it.

Mike Strang: They do sell recyclable materials. The challenge that you have, and it all comes down to the fact if the Town brought the recyclable materials to one location than it would work. The problem is that the haulers is going out to each individual home and getting them. There's a cost involved in sending a truck out to your homes to pick up your recyclable materials. The problem that you have is selling of those materials does not outweigh the cost of paying a driver a nice wage, the cost of fuel, the cost of buying the truck. It does not outweigh what you sell it for. For convenience sake, that's why it costs money.

C Hudson: So if we took recyclable materials out to the bins.

Mike Strang: It doesn't cost you any money to do that.

Scott Hoffman – the best way to describe it is that if there was money in it, we'd be doing it.

Mr. Brady I have a question. In the bid there's a paragraph that says the owner reserves the right to reject any and all bids, waive any and all formalities.....I believe that paragraph gives the Council the flexibility to not accept the low bid; and taking in to consideration other things besides price.

C Brown: Is that the case Mr. Brady?

John Brady: State Law has that paragraph in all the bidding process. I could not find any municipalities utilizing that when service wasn't a defined factor. There is one way that service could have been worked in and Scott and I talked about it. The ranking system was done purely on the numbers, based on the bid price. There was no quotient to put in there on service, no extra points for having the contract currently, and no points on performance in other areas. This was purely done to see who was the lowest bidder. In a lowest bidder the next factor you look at is can they do the job from day 1 and the issue came up on the totters and that's where we got the letters in saying that the totters would be delivered that week. The issue about yes the contract and technically the gentlemen from IDS is correct they could pick up their containers next Monday when they pick up the trash, they would be fully within their rights. And, then the trash containers would be given out the following week. There may be one pick up, when you have a switchover like this, the pick-up is in plastic bags put out the night before and the containers delivered that week. As long as on Oct 1, 2007 that the bidder is able to perform the

contract; that meets the requirements of a responsible bidder. If the letter had come in saying we can't have the totters till Nov then the Council would have to make a decision whether or not they're a responsible bidder or not.

C Brown: Based on that explanation is the opposite true? Is it not possible for the Council to take into consideration the existing service and their judgment as to its viability? Proven service is not a thing to be sneered at.

John Brady – In 1996 the State of Delaware Dept of Transportation awarded two highway contracts to one bidder and declined to award the third highway contract to the same bidder feeling they had given them too much work; and then awarded the next contract to the next bidder. Nowhere in the contract did it say you could not bid or have multiple contracts with the State of Delaware at the same time. The Court of Chancery when that lawsuit was filled bringing in the State of Delaware and the bidders ruled if you did not put it in your requirements that that would be a factor. You cannot after the bids have been received count that as a factor. So with my reading of that case, I respectfully advise you cannot use that converse as a factor because it was not in the request for quotes. That service or having multiple contracts in the area would be considered except the price and being responsible, able and available to perform on the first day of the contract.

C Duby: Being so advised I would hope that this is instructive for the future writing of RFP's

C Brown: The letter about the delivery of the totters reads "an estimated delivery on September 28, 2007". I'm particularly concerned right now because as of today's mail I still don't have a shipment that was promised by Sept 1. I have concerns about what happens if IDS picks up their trash cans as we're discussed the week before and the totters don't arrive by September 28.

John Brady: In his legal sense if the contractor cannot perform on the day and time in question then they could be sued in the appropriate court for damages, or inconvenience fees, or any of the other things as provided for. In a realistic sense given the fact that of any of the seats the gentlemen from the two companies could have chose they chose to sit that close to each other and that they've known each other for 15 years after you award the contract they may be able to work something out where there isn't a problem. However, you have to go on the facts before you and the request for proposals one factor was responsible and the second factor was price. There was not a service component; there wasn't a rating component on other Towns or Municipalities.

Mayor Post: When you mention price is that I think the estimated budget as far as for the trash we approved I think was for \$185M. And that was based without recycling, when that estimate was put in there. We're a little short on when the bid came in that it's a little more, but then when you add the recycling you're talking about adding over a 3-year period \$170M to the budget. From the first year would be \$65M that is not in the

estimate. If we move into the recycling there will be additional \$ that will have to be allocated.

C Brown: One other question. Our only options are a three year and a five year right.

John Brady: That's correct.

Mayor Post: The monthly per household for the recycling, that's what the Towns going to be charged whether people participate in the recycling or not. Is that correct?

Scott Hoffman: Correct. You do have another option. Dover and Milford are only charged for those who participate.

C Brown: Mr. Brady, if the Council makes a motion to award a contract can a motion have a second part that says that if there is a default in meeting the terms of the contract in terms of the role of responsibility in your legal language that the contract would automatically default to the second bidder.

John Brady: You can put anything you want in a motion. Will that motion survive judicial scrutiny? The answer is probably no. Here's why. If you have an automatic default that seems to be arbitrary and capricious, courts don't like arbitrary and capricious, they want to see documented facts and reason so if there were no totters here by Oct 8 which is the second date then the issue could have been raised and notice of default and given opportunity to cure. And if the default is not cured within a reasonable time period, then the contract could be terminated.

C Brown: Would it have to go out for bid again Mr. Brady?

John Brady: When I reviewed the RFP if the first bidder could not perform and that became apparent after a period of time then I believe it could go back to the second place bidder.

Mayor Post: In the RFP did it say a specific start date they would have to start the contract?

Scott Hoffman: The bidding document includes a statement "Bidder hereby agrees to commence work under the contract on or before October 1, 2007".

Mayor Post: So it must start at least October 1. So there cannot be a contingency to a motion that would say, let's face it, that's when the contract was supposed to start is Oct 1. You're saying that there could not be a contingency where there's a default that if the contractor that is awarded does not meet. There is some kind of documented back-up concern. This is the only concern because of the starting being October 1 and the delivery of the totters on Sept 28.

John Brady: Some Towns have had a performance bond that would have to be in place. There was no performance bond requirement in this RFP. Because of that any damages,

if there was a failure to pick up trash, the vendor would be subject to the damages and would be sued and that would be handled in court. Based on the factors in the RFP the Council has to make a determination as to the lowest responsible bidder. And once they make that decision there should be a motion and a second. The reason I said that this had to be done tonight when they set this date was in case one of the parties wishes to see judicial review. Expedited judicial review could be done before the start of the contract date.

Mayor Post: It looks like we're going to need a workshop on the RFP process.

C Brown: Given the concerns that we have, not only about this decision, but about the RFP, is there a possibility that we could not let a bid tonight, ask for the bidding process to be redone, and give the current contractor an extension to cover the trash pick-up in the meantime. Is that an option?

John Brady: To disregard the bids that have been done now? All the parties would have the right to judicial review. The question becomes well we didn't like one of the terms we forgot to put in an RFP. The courts in the State of Delaware upheld that when a bidder produces those documents and those documents go out and the process is done fairly and there's been the competition as required under our competitive sealed bid law that the failure to award a bid because there may be a term. The term is not a material term as to the performance of the service then the courts upheld that is arbitrary and capricious and have told the Town to award based on the previous bid results.

Scott Hoffman: I'd like to make a comment regarding the RFP. I would like to note that the RFP was written around the existing service. It was written based on the existing Towns, the existing hauler has already purchased and paid for over the life of the contract that they have now and that the low bidder, MT Trash, has to now go buy those trash cans, so that cost is obviously in their bid.

C Prettyman: I would like to make the motion to accept MT Trash Inc. Bridgeville, DE for a 3-yr contract without recycling.

C Doby: I second

Mayor Post: We have a motion and second, any questions, roll call vote

C Brown	No
C Doby	Yes
C Hudson	No
C Prettyman	Yes
Mayor Post	Yes

Motion carried

We will certainly be addressing the recycling issue as well.

C Brown: May I make a motion that the record read that the Town Council and it's citizens are very grateful to IDS for their very generous past performance so that it's not interpreted as a rejection as their professionalism.

C Duby: I second

Mayor Post: We have a motion and second, all in favor say aye, motion carried

Mayor Post: Do we have a motion to adjourn?

C Prettyman: So moved

C Duby: Second

Mayor Post: All in favor to adjourn say aye

Motion carried.

The meeting adjourned at 8:05:39 PM